Supreme Court, U.S.
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No. 97-643

In The

Supreme Court of the United States

October Term, 1997

UNITED STATES OF AMERICA,

Petitioner,

v.

VICKIE S. CABRALES,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JOHN W. ROGERS
Counsel of Record
LAW OFFICES OF DAVID B. ROGERS
Village Square Building
813 East Walnut Street, Suite B
Columbia, Missouri 65201
573-442-0131
Attorney for Respondent Vickie S. Cabrales

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent is satisfied with and generally adopts Petitioner's statements of the Opinions Below, Jurisdiction, Constitutional and Statutory Provisions and Rule Involved, and Statement, except for the following omission. Respondent, as well as Petitioner, filed a motion for rehearing in the United States Court of Appeals for the Eighth Circuit. Petitioner's motion for rehearing was denied on June 12, 1997; however, the Court amended its decision upon Respondent's motion. The Order of the Court (App., *infra*, 1a) amending its decision is reported at 115 F.3d 621.

ARGUMENT

The Eighth Circuit correctly refused to follow the lead of the Fourth,[1] Sixth,[2] Seventh,[3] and Ninth[4]

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[1] The issue in *United States v. Heaps*, 39 F.3d 479, 482 (4th Cir. 1994), was whether the district court abused its discretion in denying the defendant's motion for a change of venue pursuant to FED R. CRIM. P. 21(b). *Heaps*, 39 F.3d at 482. Thus, with venue admittedly proper where the defendant was tried, *Heaps* is not relevant to the instant case. *Id.*

[2] The Eighth Circuit distinguished *United States v. Beddow*, 957 F.2d 1330, 1336 (6th Cir. 1992), in the opinion below. See App., Petition, 4a-6a, n.4. In addition to the differences stated by the Eighth Circuit, it is noteworthy that the Sixth Circuit determines venue based on the so-called "substantial contacts rule" that takes into account a number of factors including "the site of the defendant's acts, the elements and nature of the crime, the locus of the effect of criminal conduct, and the suitability of each district for accurate fact finding. . . ." *Beddow*, 957 F.2d at 1335 (*quoting United States v. Williams*, 788 F.2d 1213, 1215 (6th Cir. 1986). Moreover, *Beddow* cites *United States v. Ospina*, 798 F.2d 1570, 1577 (11th Cir. 1986), for the novel proposition of law it apparently announced; *Ospina*, however, is not authority for "a per se rule that money laundering prosecutions may always be brought in the district in which the laundered funds were generated." Petition, 11-12. Thus, if *Beddow* does stand for such a proposition, as Petitioner claims, then the Sixth Circuit so held with no authority on which to base its conclusion.

[3] *United States v. Sax*, 39 F.3d 1380, 1390 (7th Cir. 1994), without analysis, relies on *Beddow* for the proposition "that the funds used for the acts of money laundering . . . were the proceeds of [another person's] drug sales in the Central District of Illinois. This is sufficient to confer proper venue [in that district] under § 3237(a)."

[4] *United States v. Agnotti*, 105 F.3d 539, 545 (9th Cir. 1997), without analysis, held that "[t]he money laundering began in the district from which the funds were obtained and,

Circuits in rendering meaningless the venue provisions contained in the constitution by permitting venue, in a money laundering[5] prosecution, to be based on the location of the illegal acts that generated the money that was allegedly laundered. In arguing that venue in a district is proper in a money laundering prosecution based solely on the fact that the underlying criminal conduct occurred in the district, Petitioner ignores that money laundering is a crime separate and distinct from the "specified unlawful activity" to which the statute refers. Petitioner also ignores that proving the categorical delineation or

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accordingly venue was proper there as well. See 18 U.S.C § 3237(a). In so holding, we follow the lead of the Sixth Circuit, which held in *United States v. Beddow*, 957 F.2d 1330 (6th Cir. 1992), that money laundering is a continuing offense and that venue may lie in the district where the illegal money was obtained."

[5] Respondent refers to a prosecution under 18 U.S.C. § 1956(a)(1)(B)(ii) or 18 U.S.C. § 1957(a) when using the term "money laundering." Because the linchpin of Petitioner's argument is that the money that is laundered "in fact involves the proceeds of specified unlawful activity," 18 U.S.C. § 1956(a)(1), making it allegedly "an essential element of the money laundering offenses," Petition, 9, it is necessary to restrict the term to the specific sections at issue in that certain violations of the statute do not contain this element of the offense. See, *e.g.*, 18 U.S.C. § 1956(a)(3) (making it a crime to conduct or attempt to conduct "a financial transaction involving property represented to be the proceeds of specified unlawful activity"); *United States v. Dimeck*, 815 F.Supp. 1425, 1428 (D.Kan. 1993), *rev'd on other grounds*, 24 F.3d 1239 (10th Cir. 1994) ("Congress intended that section 1956(a)(3) apply to the very situation presented by this case – a sting operation in which the property involved was not *in fact* proceeds (as required in section 1956(a)(1)), but rather, was property *represented and believed by the defendant to be* proceeds.") (emphasis in original).

status of the money, *i.e.*, that it "involves the proceeds of specified unlawful activity,"[6] is materially different from proving the underlying criminal conduct. Stated differently, Petitioner's argument ignores that the underlying "specified unlawful activity" is not an element of money laundering. By ignoring these key points of law, Petitioner erroneously concludes that money laundering begins with the "specified unlawful activity" and ends with the prohibited financial transaction making it a "continuing offense" under 18 U.S.C. § 3237(a). Finally, while Petitioner recognizes that *United States v. Anderson*, 328 U.S. 699, 703 (1946), controls the determination of whether venue is proper, Petitioner fundamentally misapplies its holding.

A. Petitioner's argument is flawed in that the underlying criminal conduct is not an element of money laundering.

The crux of Petitioner's argument is that because "an essential element of the money laundering offenses is that the funds in question must be derived from 'specified unlawful activity,' " Petition, 9, Petitioner concludes that the district in which the unlawful activity occurred is a proper venue for a money laundering prosecution. This

[6] Petitioner focuses too narrowly on the phrase "specified unlawful activity" and fails to recognize that this phrase modifies the term "proceeds"; it is the *type* of proceeds, *i.e.*, that they be derived from "specified unlawful activity," that is a necessary element of a section 1956(a)(1) prosecution, not the criminal acts of the underlying illegal activity.

argument presupposes that proving the categorical delineation or the status of the money is the same as proving the underlying criminal conduct. The flaw in this argument, of course, is that proving that money is "the proceeds of specified unlawful activity" is different than proving the *commission* of certain specified unlawful activity. See *United States v. Smith*, 44 F.3d 1259, 1264 (4th Cir. 1995) ("While it is necessary in order to include such an allegation [that the money be derived from specified unlawful activity], the requirement is merely a categorical delineation of the type of funds that are subject to a money laundering charge.").

For example, in *United States v. Ospina*, 798 F.2d 1570 (11th Cir. 1986), the government presented evidence that each time an undercover agent received money from the defendant to launder, a narcotics dog reacted positively to the presence of narcotic residue on the currency. *Id.* at 1573, 1574, 1575. The government also presented evidence that the money was always extremely dirty, that it had a powdery substance on it, and that when the undercover agents were counting the money in a money machine, a cloud came up and the agents ended up with headaches. *Id.* at 1574. The Eleventh Circuit held that this evidence was relevant in proving that the currency was tainted by narcotics, *i.e.*, that it was "proceeds of specified unlawful activity."[7] Obviously, this evidence would not be

[7] The Eleventh Circuit suggested that proving that the money is the proceeds of specified unlawful activity is not an essential element of money laundering. See *United States v. Ospina*, 798 F.2d at 1583 ("This evidence need not be 'conclusive of a material issue in order to be admitted.' ").

sufficient to sustain a conviction for distribution of cocaine; however, it is sufficient to prove that the money was "proceeds of specified unlawful activity." *Id.* Similarly, evidence that the person producing the money that was laundered had no legitimate source of income has been considered relevant to proving that the money was "proceeds of specified unlawful activity." See, *e.g.*, *United States v. Isabel*, 945 F.2d 1193, 1202 (1st Cir. 1991).

A prosecution under 18 U.S.C. § 922, felon in possession of a firearm,[8] illustrates the fallacy of Petitioner's argument. Without question, such a prosecution requires the United States to prove that the defendant is a felon – a status or a categorical delineation. Just because the status of being a felon is an "essential element of the offense," it does not follow that venue is proper based solely on where the underlying original felonious acts occurred. The same analysis would hold true to other criminal offenses that contained a similar status or categorical delineation as an element of the crime.

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[8] The venue issue presented by the hypothetical is actually more appealing than the one presented by the instant case because the crime of felon in possession requires the defendant to have committed the underlying felony whereas the offense of money laundering does not require the defendant to have committed the underlying "specified unlawful activity." Petitioner recognizes this shortcoming in its argument when it attempts to analogize the money laundering offenses to the general conspiracy statute, 18 U.S.C. § 371. Petition, 13. The issue presented by the Petition, of course, does not involve any conspiracy allegations, and Petitioner's attempt to turn an individual money laundering count into a conspiracy by permitting venue to be based on the underlying criminal activity of another person must be rejected.

In proving that the money in question "involves the proceeds of specified unlawful activity," it is irrelevant *who* committed the underlying illegal activity, specifically *when* it was committed, *where* it was committed, or *how* it was committed – the government must simply show that the money in question "involves the proceeds of specified unlawful activity." See *United States v. Gabel*, 85 F.3d 1217, 1224 (7th Cir. 1996) ("The particular nature or time of those earlier crimes is immaterial.); *United States v. Ospina*, 798 F.2d 1570 (11th Cir. 1986) (no allegation that defendant participated in underlying illegal activity, but defendant nonetheless convicted of money laundering). In *United States v. Smith*, 44 F.3d 1259, 1265 (4th Cir. 1995), the court stated:

> The core of money laundering, which distinguishes one such offense from another, is the laundering transaction itself. Because the requirement that the funds be illegally derived is not the distinguishing aspect and therefore does not lie at the core of the offense, details about the nature of the unlawful activity underlying the character of the proceeds need not be alleged.

The court concluded that "[j]ust because the statute requires that funds be obtained from '*specified*' unlawful activity does not mean that the government is required to detail the circumstances of the unlawful activity." *Id.* (emphasis in original).

United States v. Gabel, 85 F.3d 1217 (7th Cir. 1996), illustrates the above points of law. In *Gabel*, the court considered the issue of whether a conviction was within fifteen years of a money laundering offense to justify a

three-level increase in the defendant's criminal history under the sentencing guidelines. *Id.* at 1222. The government argued that the "specified unlawful activity" that generated the proceeds that was laundered was part of the instant money laundering offense, and thus, the government argued that the money laundering offense was within fifteen years of the previous offense for sentencing purposes. *Id.* at 1223-1224. In rejecting this argument, the court stated:

> [Money laundering] focuses on the conversion of the fruits of the earlier crimes into other, presumably less detectable, forms. The particular nature or time of those earlier crimes is immaterial. Only when the effort to conduct the financial transaction described by the statute begins does the relevant conduct commence for money laundering itself. Before that, an individual has simply committed burglary, drug dealing, bank robbery, or any of the myriad illegal activities that might lead to ill-gotten wealth. (citations omitted). While the statute requires that the money laundered be the fruit of an illegal act, there is no requirement that the government link the money laundered to a specific criminal act. Thus, the commission of the illegal acts cannot be considered the "commencement" of the charged offense. We therefore conclude that the burglaries and thefts to which Gabel admitted, which took place from 1988 until his arrest, do not constitute relevant conduct for the structuring or money laundering offenses.

Id. at 1224. In summary, Petitioner's argument, reduced to its simplest terms, is that money laundering begins with

the "specified unlawful activity" and ends with the prohibited financial transaction. The above-cited authority clearly demonstrates that this is not the law.

B. Petitioner's contention that Respondent's conduct constituted a "continuing offense" is misplaced.

Because Petitioner ignores that money laundering is a separate and distinct crime that follows in time the "specified unlawful activity," see Section D, *infra*, and ignores that the underlying criminal conduct is not an element of money laundering, see Section A, *supra*, Petitioner erroneously concludes that money laundering is a "continuing offense" for purposes of 18 U.S.C. § 3237(a). This erroneous conclusion is premised on the erroneous assumption that money laundering begins with the "specified unlawful activity" and ends with the prohibited financial transaction. As shown above, this is clearly not, nor should it be, the law.

The facts of the instant case do not warrant a "continuing offense" analysis. Respondent was not charged with the underlying illegal activity – the source of the money that was laundered. Respondent was charged with certain crimes that involved certain financial transactions that occurred in one place at one time. Venue must be decided on the charges that the government has filed. Anything else would make a mockery of the constitutional provisions, statutes,[9] and court rules[10] that ensure a defendant the right to be tried where the alleged crime

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[9] See, *e.g.*, 28 U.S.C. § 1114.

[10] See, *e.g.*, FED. R. CRIM. P. 18.

was committed. The "continuing offense" analysis is wholly inappropriate when the alleged conduct that constituted the offense spanned only several minutes in a Florida bank.

Considering the offenses charged, the Eighth Circuit was correct in holding that Respondent "was not accused of a 'continuing offense.' She was charged with money laundering, for transactions which began, continued, and were completed only in Florida." App., Petition, 4a.

C. *United States v. Anderson*, 328 U.S. 699 (1946), controls the issue before this Court.

Because the criminal statutes under which Respondent was charged do not contain specific venue provisions, it is necessary and proper to apply the test derived from *United States v. Anderson*, 328 U.S. 699 (1946). The test analyzes the statute defining the crime and focuses on the verbs, key terms, and policies underlying the statute to determine the site or sites of the offense and thus where venue lies. *Id.* at 705.

In deciding where an offense was committed and thus where venue lies, *Anderson* explains that "the *locus delicti* must be determined from the nature of the crime alleged and the location of the act or acts constituting it." *Anderson*, 328 U.S. at 703. This requires an analysis of the operative verbs, key terms, and policies underlying the statute defining the offense. *United States v. Griffin*, 814 F.2d 806, 810 (1st Cir. 1987); *United States v. Medina-Ramos*, 834 F.2d 874, 876 (10th Cir. 1987); c.f. *Anderson*, 323 U.S. at 705 ("It is . . . necessary . . . to decide . . . what acts of the defendant constituted the violation."). When one

analyzes the operative verbs, key terms, and policies underlying the statute defining the offense, it becomes abundantly clear that, in the instant case, venue is in Florida, not the Western District of Missouri.

For example, in Count II of the indictment, see App., Petition, 19a-20a, charged Respondent with a violation of 18 U.S.C. § 1956(a)(1)(B)(ii), making it a crime to "knowing[ly] . . . conduct[ ] or attempt[ ] to conduct . . . a financial transaction which . . . involves the proceeds of specified unlawful activity . . . knowing that the transaction is designed in whole or in part . . . to avoid a transaction reporting requirement under State or Federal law." Clearly, the key terms in the statute, and thus, where the crime is committed, is where the defendant "conducts or attempts to conduct a financial transaction." While there are intent elements to the crime ("to avoid a transaction reporting requirement under State or Federal law" and "knowing that the property involved in [the transaction] represents the proceeds of some form of unlawful activity"), these elements are not the "acts of the defendant [that] constitute[ ] the violation." *Anderson*, 323 U.S. at 705. Similarly, proving the status or categorical delineation of the money that is laundered, *i.e.*, that it "in fact involves the proceeds of specified unlawful activity," 18 U.S.C. § 1956(a)(1), is not the "acts of the defendant [that] constitute[ ] the violation." *Anderson*, 323 U.S. at 705, and is therefore not relevant for purposes of determining venue. *Id.* It is clear that what was charged in Count II of the indictment occurred in Florida. The alleged conduct which constituted the crime began and ended in a Florida bank on January 23, 1991. The Eighth Circuit correctly held that venue is not proper in the

Western District of Missouri for Count II. App., Petition, 9a.

The same analysis can be applied to Count III. Count III of the indictment, See App., Petition, 20a, charged Respondent with a violation of 18 U.S.C. § 1957(a), which makes it a crime to "knowingly engage[ ] or attempt[ ] to engage in a monetary transaction in criminally derived property that is of a value greater than $10,000 and is derived from specified unlawful activity." Like a prosecution under section 1956(a)(1), the status or categorical delineation of the money involved in the prohibited transaction, *i.e.*, that it is "criminally derived property that is of a value greater than $10,000 and is derived from specified unlawful activity," is not the element of the crime that is the "acts of the defendant [that] constitute[ ] the violation." *Anderson*, 323 U.S. at 705, and is therefore not relevant for purposes of determining venue. *Id.* Rather, venue is proper in the district where the defendant "knowingly engages or attempts to engage in a monetary transaction." It is clear that what was charged in Count III occurred in Florida. The alleged conduct which constituted the crime began and ended in a Florida bank on January 22, 1991. The Eighth Circuit correctly held venue does not lie in the Western District of Missouri for Count III. App., Petition, 9a.

Under *United States v. Anderson*, 328 U.S. 699 (1946), Respondent "was not accused of a 'continuing offense.' She was charged with money laundering, for transactions which began, continued, and were completed only in Florida." App., Petition, 4a. The Eighth Circuit correctly found that "[t]he only acts which formed the basis for the money-laundering charges in the instant case consisted of

banking transactions which [Respondent] executed only in Florida. Under these facts . . . the District Court correctly dismissed Counts II and III as improperly venued in Missouri." App., Petition, 9a.

D. Money Laundering is a separate and distinct crime from the "specified unlawful activity" to which the statute refers.

The money laundering statutes create a separate crime, separately punishable, from the underlying criminal activity.[11] *United States v. Heaps*, 39 F.3d 479, 486 (4th Cir. 1994). See also *United States v. Edgmon*, 952 F.2d 1206, 1213 (10th Cir. 1991), *cert. denied*, 505 U.S. 1223, 112 S.Ct. 3037, 120 L.Ed.2d 906 (1992) ("Congress appears to have intended the money laundering statute to be a separate crime distinct from the underlying offense that generated the money to be laundered."). The crime of money laundering, by definition, cannot occur until after the completion of the underlying "specified unlawful activity." 18 U.S.C. § 1956(a)(1); *United States v. Edgmon*, 952 F.2d at 1213-1214 ("Congress aimed the crime of money laundering at conduct that follows in time the underlying crime rather than to afford an alternative means of punishing the prior 'specified unlawful activity.' "); *United States v.*

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[11] Without disputing this important point of law, Petitioner nonetheless argues that venue in a money laundering prosecution can be based on the acts that comprise this separate and distinct crime.

Savage, 67 F.3d 1435, 1441 (9th Cir. 1995) ("Congress considered money laundering to be separate conduct occurring after completion of the underlying criminal offense."). Indeed, in *United States v. Dimeck*, 24 F.3d 1239, 1246 (10th Cir. 1994), the Court recognized that it "stressed in *Edgmon* that a violation of § 1956(a)(1)(B)(i) must 'follow in time' the completion of the underlying" unlawful activity. This analysis is also true to a section 1957 violation. See *Edgmon*, 952 F.2d at 1442 ("we conclude that 'criminally derived property' under § 1957 is equivalent to 'proceeds' under § 1956, *i.e.*, funds obtained from prior, separate criminal activity."); *United States v. Johnson*, 971 F.2d 562, 569-570 (10th Cir. 1992) ("criminally derived property" is the proceeds from an underlying criminal offense obtained by the defendant before the defendant engages in the monetary transaction prohibited by section 1957).

E. The question of proper venue raises deep issues of public policy.

In *United States v. Johnson*, 323 U.S. 273, 275 (1944), this Court stated:

> Aware of the hardship to which a trial in an environment alien to the accused exposes him, the Framers wrote into the Constitution that "The Trial of all Crimes . . . shall be held in the State where said crimes have been committed. . . . " Article III, § 2, cl. 3. As to underscore the importance of this safeguard, it was reinforced by the provision of the Bill of Rights requiring trial "by an impartial jury of the State and District wherein the crime shall have been committed." Sixth Amendment.

Recognizing the importance of these two constitutional provisions,[12] this Court stated:

> These are matters that touch closely the fair administration of criminal justice and public confidence in it, on which it ultimately rests. These are important factors in any consideration of the effective enforcement of the criminal law. . . . Questions of venue in criminal cases, therefore, are not merely matters of formal legal procedure. They raise deep issues of public policy in the light of which legislation must be construed.

Id. at 276.

This Court has warned against an expansive interpretation of venue, which could lead to needless hardship on the defendant who is forced to defend herself far from home and available defense resources, as well as "the appearance of abuses, if not to abuses, in the selection of what may be deemed a tribunal favorable to the prosecution." *Id.* at 275; *Travis v. United States*, 364 U.S. 631, 634 (1961) ("We are also aware that venue provisions in Acts of Congress should not be so freely construed as to give

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[12] The 1979 Committee Notes to FED R. CRIM. P. 18 explain the difference between these two constitutional provisions: Article III, § 2, clause 3 of the United States Constitution places venue (the geographical location of the trial) "in the State where the said Crimes shall have been committed," while the Sixth Amendment defines the vicinage (the geographical location of the jurors) as "the State and district wherein the crime shall have been committed, which district shall have previously been ascertained by law."

the Government the choice of 'a tribunal favorable' to it."). These constitutional provisions and the cases interpreting them guarantee a defendant an absolute right to be tried by an impartial jury of her peers where the crime was committed.

CONCLUSION

The Eighth Circuit correctly decided the issue presented by the Petition. The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

JOHN W. ROGERS
Attorney for Respondent

APPENDIX

UNITED STATES of America, Appellant,

v.

Vickie S. CABRALES, Appellee.

No. 96-3080.

United States Court of Appeals,
Eighth Circuit.

June 12, 1997.

On Appeal from the United States District Court for the Western District of Missouri.

Before RICHARD S. ARNOLD, Chief Judge, ROSS and BEAM, Circuit Judges.

ORDER

Vickie Cabrales has petitioned this panel to amend its opinion in *United States v. Cabrales*, 109 F.3d 471 (8th Cir.1997). Though Cabrales prevailed in that case, she is concerned that a phrase contained in one of the footnotes of the opinion may adversely affect her in a criminal case which remains pending against her. See *id.* at n. 2. The footnote is merely an explanatory one, and should have no effect on another court's decision. Likewise, however, it is not necessary to the holding nor to the reasoning of the opinion itself, and we therefore amend the opinion to ensure that no incorrect inferences are drawn from it.

Accordingly, we order that footnote two of the opinion be amended to read: "The Court did not dismiss Count I, the conspiracy charge. Count I is not part of this appeal."

It is so ordered.